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The Ardit Company *and* International Union of Bricklayers and Allied Craftworkers, Ohio-Kentucky Administrative District Council, Local Union No. 18. Cases 09–CA–089159 and 09–CA–107434

October 27, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On February 24, 2014, the National Labor Relations Board granted the parties' joint motion to transfer this proceeding to the Board on a stipulated record. Having reviewed and considered the stipulated record and the parties' briefs,[1] we find that the Respondent, The Ardit Company, violated Section 8(a)(5) and (1) by unilaterally implementing new terms and conditions of employment, by unilaterally laying off unit employees, and by failing to respond to the Union's information requests. In doing so, we begin by making the following

FINDINGS OF FACT

I. JURISDICTION, LABOR ORGANIZATION STATUS, AND SUPERVISORY AND AGENT STATUS

The Respondent, a corporation with an office and place of business in Columbus, Ohio, has been engaged as a contractor in the construction industry. In the 12 months prior to the issuance of the complaint, the Respondent purchased and received goods valued in excess of $50,000 directly from points outside the State of Ohio. The Respondent admits, and we find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Michelle Johnson is its president, and the Respondent admits, and we find, that she is a supervisor within the meaning of Section 2(11) of the Act and the Respondent's agent within the meaning of Section 2(13). The parties admit, and we find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

The Respondent is a commercial flooring contractor, installing tile, terrazzo, and stone floors, mostly at public projects at universities and county and State government entities in central Ohio. The Respondent was a member of the Tile, Marble and Terrazzo Contractors Association of Greater Cincinnati (the Association) from about January 2, 2008, until May 31, 2011. The Association negotiated and administered collective-bargaining agreements on the Respondent's behalf, including an 8(f) agreement with the Union covering the Respondent's tile, marble, and terrazzo installers and helpers, the bargaining unit at issue here, effective through August 31, 2012.

On May 31, 2011, the Respondent withdrew from the Association and notified the Union that it would be terminating the 8(f) agreement when it expired.[2] On or about November 17, 2011, the Respondent advised its employees that it would implement new terms and conditions of employment when the contract expired, including changing employees' wages and health insurance, ceasing contributions to the Union's pension plan, and implementing flexible spending accounts, profit sharing, and a 401(k) plan. The employees were given informational packets about these changes.

On June 26, 2012, the Union filed a representation petition seeking an election in a unit of the Respondent's tile, marble, and terrazzo workers. A 9(a) election was held on August 10, 2012. The Respondent filed timely objections, which the Regional Director overruled on September 6, 2012. After determinative challenges were resolved, the tally of ballots showed 6 votes for and 3 against the Union, and the Regional Director certified the Union as the unit employees' 9(a) representative on May 13, 2013. The Respondent refused to bargain with the Union. On December 12, 2013, the Board granted the General Counsel's Motion for Summary Judgment and found that the refusal to bargain violated Section 8(a)(5) of the Act. (360 NLRB No. 15.)

The 8(f) agreement expired on August 31, 2012, after the 9(a) election. On September 1, 2012, the Respondent unilaterally implemented the previously announced changes to unit employees' terms and conditions of employment. The Respondent posted a notice on September 4, 2012, telling the unit employees that the changes were made in accordance with its previously announced intention of doing so upon the expiration of the 8(f) agreement. Two days later, the Union sent the Respondent a letter challenging the changes and requesting that the Respondent abide by the preexisting terms and conditions of employment pending the certification of the results of the election. The Respondent did not reply.

[1] The Respondent, General Counsel, and Charging Party Union each filed briefs with the Board. The General Counsel and the Respondent also filed answering briefs. The Union filed the underlying charge in Case 09–CA–089159 on September 13, 2012, and in Case 09–CA–107434 on June 17, 2013. On July 8, 2013, the General Counsel issued the consolidated complaint.

[2] We construe the Respondent's May 31, 2011 notice to the Union as signifying that it was also terminating its 8(f) bargaining relationship with the Union at the expiration of the 8(f) agreement.

In early 2013, the Respondent was finishing up a project at 120 West Gay Street in Columbus, Ohio. Normally, when one project wrapped up, the Respondent would send its terrazzo workers to another jobsite. But the Respondent had recently lost a bid for work at the Port Columbus International Airport, and it was unable to begin work on a scheduled project at the Ohio State University Medical Center because the University had decided to redesign the project and had issued a "stop work" order. As a result, the Respondent was not able to send its workers to another jobsite. The Respondent unilaterally laid off nine unit employees on various dates from February 2, 2013, through March 6, 2013.[3] During the term of its 8(f) agreement with the Union, the Respondent had laid off employees without notifying the Union or affording it an opportunity to bargain.

About May 3, 2013, the Union requested 12 items of information from the Respondent. The parties stipulated that six of the items are presumptively relevant, and the remaining six are relevant because they relate to the unilateral changes the Respondent made on September 1, 2012, and will assist the Union in making collective-bargaining proposals. The Union renewed its May 3 information request on May 17, 2013, after the certification of representative issued. The Respondent had not responded to either request at the time of the motion to transfer this proceeding to the Board.

III. LEGALITY OF THE UNDERLYING CERTIFICATION

In its brief to the Board, the Respondent argues that the Union was improperly certified because the Board did not have a lawful quorum under *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), when it ruled on various of the Respondent's motions and requests for review in the representation proceeding leading to the Union's certification. All arguments that the Union was not properly certified could have been but were not raised to the lawfully constituted Board that issued the December 12, 2013 decision and order in the 8(a)(5) refusal-to-bargain proceeding described above. Accordingly, the Respondent has waived any contention that the Union was not lawfully certified.[4]

IV. ANALYSIS

The primary question presented here is whether the Respondent—which was under a statutory duty to bargain with the union at all relevant times—was nevertheless free to change employees' terms and conditions of

[3] The laid-off employees are Joe Thompson, Justin Hipkins, Tom McAllister, Rick Wilson, Tim Clemmons, Lee Clemmons, Greg Salabritas, Horacio Guzman, and Jose Ramirez.

[4] The Respondent contends on brief to the Board that the amended complaint is ultra vires because the former Acting General Counsel did not lawfully hold that office at the time the consolidated complaint issued (July 8, 2013). On October 19, 2015, the Respondent additionally filed a notice of supplemental authority, arguing that the former Acting General Counsel "did not properly hold the position of General Counsel from January 5, 2011 through November 4, 2013." The Respondent relied on *SW General, Inc. v. NLRB*, 796 F.3d 67, 74–75 (D.C. Cir. 2015), petition for rehearing en banc denied Case No. 14–1107 (Jan. 20, 2016), petition for cert. granted 136 S.Ct. 2489 (2016). We find no merit in the Respondent's contention.

On June 18, 2010, the President directed Lafe Solomon, then-Director of the NLRB's Office of Representation Appeals, to serve as Acting General Counsel pursuant to subsection (a)(3)—the senior agency employee provision. Under that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. See *Hooks v. Kitsap Tenant Support Services* (*Kitsap II*), 816 F.3d 550, 557 (9th Cir. 2016). The Respondent does not contend otherwise.

We acknowledge that the decisions in *Kitsap II* and *SW General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. *Kitsap II*, 816 F.3d at 558; *SW General*, 796 F.3d at 78. Although that question is still in litigation, we find that subsequent events have rendered moot the Respondent's argument that Solomon's alleged loss of authority after his nomination precludes further litigation in this matter. Specifically, on October 23, 2015, General Counsel Richard F. Griffin Jr. issued a Notice of Ratification in this case which states, in relevant part,

> The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.
>
> The United States Court of Appeals for District of Columbia Circuit recently held that Acting General Counsel Solomon's authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. § § 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. *SW General, Inc. v. NLRB*, __ F.3d __, 2015 WL 4666487, (D.C. Cir., Aug. 7, 2015). The Court found that complaints issued while Mr. Solomon's nomination was pending were unauthorized and that it was uncertain whether a lawfully-serving General Counsel or Acting General Counsel would have exercised discretion to prosecute the cases. Id. at 10.
>
> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in SW General. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by SW General are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. Id. at 9 (citing 5 U.S.C. § 3348(e)(l)).
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.
>
> In view of the independent decision of General Counsel Griffin to continue prosecution in this matter, we reject the Respondent's affirmative defense challenging the circumstances of Solomon's "appointment" as Acting General Counsel as moot.

employment unilaterally, because it had prospectively announced that the changes would be made at a point when the Respondent anticipated—wrongly—that its bargaining obligation would be over. We have no difficulty in concluding that the Respondent acted unlawfully in making the changes, as well as in unilaterally laying off employees and by failing to honor the Union's requests for relevant information.

A. The Respondent's unlawful unilateral changes

Our analysis of the Respondent's unilateral changes begins with several well-established principles that define the legal landscape here. First, whether an employer's collective-bargaining relationship with a union is based on Section 8(f) of the Act or on Section 9(a), during that relationship the employer may not change employees' terms and conditions of employment without giving the union notice and an opportunity to bargain. See *Conditioned Air Systems*, 360 NLRB No. 97, slip op. at 1 fn. 3 (2014). Second, an 8(f) relationship is terminable upon the expiration of the parties' collective-bargaining agreement; a 9(a) relationship is not. See *John Deklewa & Sons*, 282 NLRB 1375, 1386–1387 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). Upon contract expiration, then, an 8(f) employer (but not a 9(a) employer) may unilaterally change existing terms and conditions of employment without bargaining and may refuse to meet or bargain with the union altogether. See id. at 1386–1387; see also *MSR Industrial Services*, 363 NLRB No. 1, slip op. at 2 (2015). Third, once a union wins a representation election and establishes its 9(a) status, the employer is no longer permitted to make unilateral changes (assuming it *was* permitted before) even while objections to the election remain pending. See *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). As explained below, these basic principles inescapably lead to the conclusion that the Respondent's unilateral action here was unlawful.

The Respondent announced its planned changes to terms and conditions of employment on November 17, 2011. At that time, the Respondent was subject to its 8(f) collective-bargaining agreement with the Union, and thus could not immediately implement those changes unilaterally. Its only lawful options were to obtain the Union's consent to its desired changes, or to defer implementation of those changes until it was no longer under a bargaining obligation. The Respondent chose to wait—but, as it turned out, its bargaining obligation did not end. Rather, the statutory basis of the obligation simply changed. As described, *prior* to the expiration of the parties' 8(f) agreement, the Respondent's employees elected the Union to be their representative under Section 9(a). Thus, at all material times and with no interruption, the Respondent was obliged to bargain with the Union, first by virtue of Section 8(f) and then by virtue of Section 9(a).[5] The Respondent nevertheless proceeded to act unilaterally the day after the parties' 8(f) agreement expired. In these circumstances, we agree with the General Counsel that the Respondent acted unlawfully.[6]

Finding the Respondent's conduct unlawful is not only consistent with the well-established principles, identified above, but also serves one of the Act's fundamental policies: to promote stable collective-bargaining relationships. Preventing employers from acting unilaterally in these circumstances—during the seamless transition from an 8(f) to a 9(a) relationship—ensures that the parties' negotiations for a new collective-bargaining agreement will begin with the true status quo. Union-represented employees working under an 8(f) agreement surely understand that they can preserve their existing terms and conditions of employment by pursuing a Board election and securing 9(a) status for their union. They would also understand that an employer's prospectively-announced changes could be blocked by a future union election victory—indeed, the announcement might well be why employees pursue an election. An approach that ignores this change in the Union's status would put the newly-certified Union at risk of having to win back previously negotiated terms and conditions of employment, thereby thwarting the possibility of agreement and undermining the Union in the eyes of the employees. Further, it would permit the incongruous result that the employees' decision to *enhance* their existing union's status was nevertheless deemed insufficient to prevent the employer from making a change it could not make while the union enjoyed a *lesser* status.

To be sure, as the Respondent and our dissenting colleague point out, there are limited circumstances when an employer *whose employees were not previously represented* is nevertheless free to make unilateral changes, notwithstanding a union's election victory. Where employees have not been represented, Board precedent permits an employer to implement a change that it had firmly decided on *before* the election even if in the interim its employees have elected a collective-bargaining

[5] Although the Respondent's objections to the election remained pending, they were later overruled and the Union was certified. See *Mike O'Connor Chevrolet*, above.

[6] In so finding, we do not rely on the General Counsel's citation to *Hargrove Electric Co.,* 358 NLRB 1395 (2012), which issued at a time when the composition of the Board included two persons whose appointments to the Board were subsequently held invalid by the Supreme Court in *NLRB v. Noel Canning*, supra.

representative. But employers in those circumstances are in a fundamentally different position from the Respondent here. The rationale underlying that precedent is that it preserves a nonunion employer's unconditional right to make firm decisions regarding its work force without the risk of future unionization negating those decisions. See, e.g., *Camvac International*, 288 NLRB 816, 818–819 (1988) (employer that decided on new sick leave policy before a union demanded recognition could lawfully implement the change). This rationale is not applicable to the Respondent. As explained, at all material times the Respondent was subject to the statutory duty to bargain with the union representing its employees; it was never in a position to unilaterally make decisions regarding future terms and conditions of employment. That the Respondent *expected* to be in such a position—anticipating the expiration of its 8(f) agreement, but not the union's election before the agreement expired—makes no difference.[7]

Nor are we persuaded by the dissent's argument that our finding puts employers similarly situated to the Respondent at risk of violating the Act if, after a union is certified, they do *not* implement previously announced changes. The premise of this argument is that the Respondent's changes, once announced, immediately became terms and conditions of employment. But this premise is incorrect. As explained, an employer subject to an 8(f) agreement may not make unilateral changes during the agreement's term. After the agreement expires, the employer will be free to make such changes—but only if there is no other source of the duty to bargain, such as intervening union election victory. Contrary to the dissent's expressed fear that similarly-situated employers have no legal path forward to avoid committing an unfair labor practice—i.e., failing to implement previously announced changes is unlawful, but implementing them unilaterally also violates the Act—there is a lawful path forward. All those employers need do is fulfill their statutory duty to bargain in good faith with their employees' chosen representative.[8] An employer would do so by obtaining the union's consent to the changes. Alternatively, it could propose the changes during collective-bargaining negotiations and bargain in good faith to agreement or an overall lawful impasse on terms of a collective-bargaining agreement.

For similar reasons, there is no inconsistency between our decision here and the rule that a *nonunion* employer that has announced an intention to make changes while nonunionized must, once employees select union representation, proceed as if the union were not on the scene

[7] *Starcraft Aerospace*, 346 NLRB 1228 (2006), *SGS Control Services*, 334 NLRB 858, 861 (2001), and *Consolidated Printers, Inc.*, 305 NLRB 1061, 1066–1067 (1992), each cited by the Respondent, are therefore distinguishable because in each of those cases, the employer was under no duty to bargain at the time it decided to make the disputed changes.

In *Starcraft Aerospace*, supra, after the union filed a representation petition, the employer, whose business was failing, decided to lay off its employees but delayed the layoffs until after the election to avoid affecting the election results. The union won the election, and the employer implemented the layoffs the next day. The Board found that the layoffs did not violate the Act because the decision was made before the election, when the employer had no duty to bargain. 346 NLRB at 1230 ("If . . . an employer makes a decision to implement a change *before* being obligated to bargain with the union, the employer does not violate Section 8(a)(5) by its later implementation of that change" (internal quotations omitted).).

Similarly, in *SGS Control Services*, supra, the employer, in anticipation of a pending change in state law, decided to change its overtime policy "well before the [u]nion was on the scene," and thus when it was under no obligation to bargain. The employer had to delay implementing the change until the new law went into effect. In the interim, the union won an election and was certified. Nonetheless, the Board found that the employer was free to implement the change after the election because the decision predated the union.

Finally, in *Consolidated Printers, Inc.*, supra, the Board found that the employer lawfully implemented layoffs that it had decided on before the election, but had postponed until after the election in order to avoid affecting the election results.

[8] Nor is there merit to the dissent's related assertion that the Respondent would have risked violating Sec. 8(a)(2) of the Act by bargaining over its previously announced changes with the Union before the Union was formally certified. The Board rejected a similar argument in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 726, 726 fn. 52 (2001). In *Levitz*, the Board held that an employer lawfully may withdraw recognition from a majority-status union only upon a showing that the union has, in fact, lost the support of a majority of the unit employees. In reaching that holding, the Board rejected a dissenter's argument that this new standard put employers in a "no-win situation": "[A]n employer must withdraw recognition if it has evidence that the union has lost majority status, in order to avoid violating Section 8(a)(2), yet will violate Section 8(a)(5) if it cannot prove that the union had, in fact, lost majority support." Id. at 726. Describing that supposed "dilemma" as "more apparent than real," the Board explained that an employer with evidence of actual loss of majority support could petition for an RM election rather than withdraw recognition, and that the Board "would not find that the employer violated Section 8(a)(2) by failing to withdraw recognition while the representation proceeding was pending." Id. Expanding on the latter assurance, the Board added that it would follow the same approach regardless of the type of petition filed, including one for an RC election in which the incumbent union will appear on the ballot, because "[i]n each instance, the incumbent union's status will be determined in a Board election, the preferred method of testing unions' majority support." Id. at 726 fn. 52. Moreover, the Board explained, "No statutory policy would be furthered by requiring such employers to withdraw recognition unilaterally in order to avoid violating Sec. 8(a)(2). In this context, continued recognition promotes stability in industrial relations, without frustrating employee free choice." Id. Likewise, where, as here, an 8(f) incumbent union apparently has secured majority status by prevailing in a Board-conducted election (clearly putting the union in a more favorable position than a union facing evidence that it actually no longer enjoys majority support), no statutory policy would be served by requiring the employer to refrain from continuing to recognize and bargain with the union in order to avoid violating Sec. 8(a)(2).

and make the previously-announced change. In those circumstances, the employer's decision *not* to implement previously announced changes would reasonably be understood by employees as an unlawful reprisal for selecting the union. See, e.g., *Retlaw Broadcasting Co.*, 302 NLRB 381, 381–382 (1991); *McCormick Longmeadow Stone Co.*, 158 NLRB 1237, 1238, 1242 (1966). In circumstances like those presented in this case, when employees have been continuously represented by the Union at all relevant times, the Respondent's decision to *follow through* with its earlier announcement sends an unlawful message to employees of a different kind: that their union can be bypassed, despite the fact that it has never ceased to be their bargaining representative and, indeed, has just been selected by employees in a Board election. It makes no sense to argue that here, employees would view the employer's decision *not* to act unilaterally as a reprisal for their selection of the union—just the opposite.

For all these reasons, we find the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to its unit employees' terms and conditions of employment.

B. The Respondent's unlawful unilateral layoffs

When a union is the exclusive representative of a unit of employees under Section 9(a) of the Act, the employer of those employees must notify the union and give it an opportunity to bargain before making changes in the unit employees' terms and conditions of employment, *NLRB v. Katz*, 369 U.S. 736 (1962), unless "an unforeseen occurrence, having a major economic effect, . . . requires the company to take immediate action," *Angelica Healthcare Services*, 284 NLRB 844, 853 (1987). The Respondent acknowledges that a decision to lay off employees is a mandatory subject of bargaining. But it contends that the layoffs it conducted unilaterally in early 2013 were lawful on two grounds: the layoffs were excused by economic exigency, and they were permitted under the terms of the expired 8(f) agreement. As explained below, we reject both of these defenses and find that the Respondent violated Section 8(a)(5) when it laid off employees unilaterally in early 2013.[9]

Bargaining may be excused if an unforeseen event having a major economic effect requires immediate action. *Angelica Healthcare Services*, above; *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). However, "business necessity is not the equivalent of compelling considerations [that] excuse bargaining." *Farina Corp.*, 310 NLRB 318, 321 (1993) (rejecting employer's "compelling economic circumstances" defense where employer was not insolvent, in bankruptcy, or had had its assets frozen at the time of the layoffs at issue). Here, the Respondent lost a major contract when the Ohio State University issued a stop-work order on the Medical Center project, and its bid for another contract was unsuccessful. These circumstances are unfortunate, but the Board has consistently found that such downturns in business do not rise to the level of a dire financial emergency that would completely suspend the duty to bargain. See *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995) (citing cases).[10]

The Respondent further contends that the disputed layoffs were permitted under the management-rights clause in the expired 8(f) agreement, in which the Union waived its right to bargain over work-related layoffs by vesting in the Respondent the exclusive right "to relieve employees from duty because of lack of work." It is well established, however, that "the waiver of a union's right to bargain does not outlive the contract that contains it." *Ironton Publications*, 318 NLRB 1048, 1048 (1996). See *E. I. du Pont de Nemours*, 364 NLRB No. 113, slip op. at 5–7 (2016).[11] Accordingly, we find the Respondent's contention without merit.

C. The Respondent's unlawful failure to provide relevant information

On or about May 3, 2013, the Union submitted twelve information requests, all either presumptively relevant or stipulated to be relevant, and the stipulated record establishes that as of the date of the parties' Joint Motion and Stipulation of Facts (Aug. 14, 2013), the Respondent had not responded to the request or provided the requested information. Accordingly, we find that the Respondent violated Section 8(a)(5) as alleged by failing to furnish requested relevant information. The Respondent claims in its brief that it provided the requested information on March 11, 2014. That claim is unsupported by the stipulated record. But even assuming its truth, this was a delay of more than 10 months, which the Respondent does not attempt to excuse, and an 8(a)(5) violation would still lie. See *Good Life Beverage Co.*, 312 NLRB 1060, 1062

[9] At the time of the layoffs, the Union had not yet been certified: the layoffs happened in February and March 2013, and the certification issued on May 13, 2013. However, the Respondent acted at its peril when it carried out the layoffs, and the layoffs ripened into an 8(a)(5) violation when the Union was subsequently certified. See *Mike O'Connor Chevrolet*, supra, 209 NLRB at 703.

[10] The Respondent also states that the early 2013 layoffs "were not contrary to past practice with respect to layoffs," but its economic exigency defense takes for granted that the layoffs constituted a change.

[11] We decline to address the rationale our dissenting colleague relies on to dismiss the 8(a)(5) layoffs allegation. See *Can Am Plumbing, Inc.*, 350 NLRB 947, 948 (2007) ("[T]he Board only decides issues that are presented and litigated by the parties.").

fn. 9 (1993) ("What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow."); *Woodland Clinic*, 331 NLRB 735, 736–737 (2000) (finding delay of 53 days in providing requested relevant information violated Sec. 8(a)(5)).

CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union when it unilaterally implemented changes to unit employees' terms and conditions of employment on September 1, 2012.

2. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union by unilaterally laying off unit employees in early 2013.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union by failing and refusing to provide the Union relevant information in response to the Union's May 3 and 17, 2013 requests.

REMEDY

As we have found the Respondent violated the Act by unilaterally changing unit employees' terms and conditions of employment on September 1, 2012, we shall order it to cease and desist from making such unilateral changes, to rescind those changes upon request,[12] and to make the unit employees whole for any loss of earnings and other benefits resulting from those changes. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the Union's pension plan in order to satisfy our "make whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[13] Further, the Respondent shall be required to reimburse unit employees for any expenses ensuing from its changes to their health insurance, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Having found that the Respondent unlawfully laid off employees Joe Thompson, Justin Hipkins, Tom McAllister, Rick Wilson, Tim Clemmons, Lee Clemmons, Greg Salabritas, Horacio Guzman, and Jose Ramirez in early 2013, we order it to offer those employees reinstatement and to make them whole. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, the Respondent shall be required to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016).

Finally, having found that the Respondent unlawfully failed and refused to provide the Union with requested relevant information, we shall order it to provide the information to the extent it has not already done so.

ORDER

The National Labor Relations Board orders that the Respondent, The Ardit Company, Columbus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(b) Laying off unit employees without first notifying the Union and giving it an opportunity to bargain.

(c) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[12] The Board's settled practice is to order rescission of unlawful changes detrimental to employees, but to order rescission of beneficial changes only at the request of the bargaining representative. We cannot determine from the stipulated record, however, whether particular changes implemented on September 1, 2012, improved or worsened unit employees' terms and conditions of employment. Since one or more changes may have been improvements, we will order the Respondent to rescind the changes upon request of the Union; but we emphasize that this does not alter our adherence to the above-stated settled practice.

[13] To the extent that an employee has made personal contributions to the fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) At the request of the Union, rescind the changes in unit employees' terms and conditions of employment that were unilaterally implemented on September 1, 2012.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All tile, marble, and terrazzo installers and helpers employed by the Respondent out of its Columbus, Ohio facility, but excluding office clericals and all professional employees, guards, and supervisors as defined in the Act.

(c) To the extent the Respondent has not already done so, furnish to the Union in a timely manner the information it requested on May 3 and 17, 2013.

(d) Reimburse any union benefit funds for missed contributions in the manner set forth in the remedy section of this decision.

(f) Within 14 days from the date of this Order, offer Joe Thompson, Justin Hipkins, Tom McAllister, Rick Wilson, Tim Clemmons, Lee Clemmons, Greg Salabritas, Horacio Guzman, and Jose Ramirez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make whole unit employees for any losses suffered as a result of the September 1, 2012 unilateral changes in the manner set forth in the remedy section of this decision.

(g) Make Joe Thompson, Justin Hipkins, Tom McAllister, Rick Wilson, Tim Clemmons, Lee Clemmons, Greg Salabritas, Horacio Guzman, and Jose Ramirez whole for any loss of earnings and other benefits suffered as a result of their unlawful layoffs in the manner set forth in the remedy section of this decision.

(h) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Columbus, Ohio facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2012.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 27, 2016

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Mark Gaston Pearce, Chairman

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(5) by refusing to provide the Union with requested information relevant to its duties as the em-

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployees' collective-bargaining representative, and I join that part of the Board's decision. I respectfully dissent, however, from their findings that the Respondent violated Section 8(a)(5) by unilaterally changing employees' terms and conditions of employment on September 1, 2012, and by unilaterally laying off unit employees in early 2013. My reasons follow.

1. The September 1, 2012 implementation of previously announced employment terms

The Respondent implemented new employment terms, which had been previously announced, on September 1, 2012, the day after its 8(f) agreement with the Union expired. Between the announcement of those terms and their implementation, the Union won a representation election, though it had not yet been certified. When September 1, 2012, arrived, the Respondent had three options: (i) it could implement the terms it had previously announced; (ii) it could refrain from implementing those terms; or (iii) it could give the Union notice and opportunity to bargain. Under any fair system of law, one of these options must be lawful. Under the majority's decision here, *all three* options are unlawful.

The Respondent took the first option and implemented the terms and conditions of employment it had previously announced. Board case law is crystal clear that this action was lawful. An employer does not violate Section 8(a)(5) when, *after* a union is elected, it implements a term or condition of employment decided on *before* the election. See, e.g., *Starcraft Aerospace, Inc.*, 346 NLRB 1228, 1230 (2006). Indeed, as explained below, an employer would violate the Act by *failing* to implement that employment term because that failure would *itself* be a unilateral change. But my colleagues have carved out an exception to this rule on the basis that the parties had a preexisting bargaining relationship and were parties to a prehire collective-bargaining agreement pursuant to Section 8(f). The majority creates a new two-part standard. On the one hand, whenever a union is elected as a bargaining representative, the employer *must* implement previously announced employment terms, and a *refusal* to implement such terms (assuming that union negotiations have not yet resulted in an agreement) would violate Section 8(a)(5). On the other hand, the employer must do *the exact opposite* if an 8(f) prehire agreement existed when the employer previously announced changes. If bargaining with the newly elected union has not yet resulted in an agreement, the employer must *not* implement the previously announced terms, and their implementation will violate Section 8(a)(5).

Merely stating the above two-part analysis reveals one problem: the two different courses of action are irreconcilable. According to the majority, when changes have been announced in the absence of an 8(f) agreement, and a union is subsequently elected, the employer must do one thing (implement the changes), but if changes are announced while an 8(f) agreement existed, the employer must do the opposite (refrain from implementing the changes). The difference must be reasonably attributable to the role played by the 8(f) prehire agreement.

This gives rise to the second problem created by my colleagues' approach: it is directly contrary to well-established principles that govern 8(f) agreements. Specifically, the Board held 25 years ago—and it remains existing law—that an employer may freely implement new terms and conditions of employment when an 8(f) agreement expires. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 109 S.Ct. 222 (1988). And nobody contends that it was unlawful for the Respondent to announce those changes while the 8(f) agreement was still in effect. Nonetheless, in my colleagues' view, the Respondent could *not* implement its previously announced changes after the 8(f) agreement expired without risking an 8(a)(5) violation should the Union be subsequently certified, as happened here.

Yet, it appears clear that the Respondent here would have violated the Act by choosing *not* to implement the terms and conditions of employment it had previously decided on and announced. Once the Respondent announced those terms and conditions, *they became conditions of employment*, and the Respondent was not free to change them unilaterally after its employees selected the Union as their 9(a) representative. The phrase "conditions of employment" "includes not only what the employer has already granted, but also what he *proposes* to grant." *Armstrong Cork Co. v. NLRB*, 211 F.2d 843, 845 (5th Cir. 1954) (emphasis added). Thus, in *United Aircraft Corp.*, 199 NLRB 658 (1972), the Board found that the employer violated Section 8(a)(5) when it withheld a previously announced wage increase after its employees elected a union. Id. at 663.

The relevant facts of *United Aircraft* are remarkably similar to those in the instant case. On April 17, 1969, the employer announced a present wage increase, plus a future increase effective a year later, on April 20, 1970. Id. at 661. On March 25, 1970, the employer's employees elected a union representative, and the union was certified on April 16, 1970—4 days before the effective date of the promised wage increase. Id. Believing the increase had become subject to negotiation as a result of the union's certification, the employer withheld it. Id. at 662. The Board found that by doing so, the employer violated Section 8(a)(5). Id. at 663. Citing *Armstrong*

Cork, supra, the Board stated that the employer's 1969 decision to give employees a wage increase in April 1970 "made the April 1970 wage increase a condition of their employment." Id. at 662. Thus, "[b]y withholding the increase on April 20, 1970, [r]espondent affected [sic] a change in conditions of employment." Id.

Similarly, in *McDonnell Douglas Aerospace Services Co.*, 326 NLRB 1391 (1998), the employer announced enhanced benefits, to take effect in 3 months; in the interim, the union was elected and certified; and when the time arrived to implement the benefits, the employer refrained. The Board found that by withholding the announced benefits, the employer violated Section 8(a)(5). Id. at 1396. Again citing *Armstrong Cork*, supra, the Board explained that the promise to implement enhanced benefits "became an existing condition of employment which [r]espondent unilaterally withheld because the [u]nion won the election. . . . This is a violation despite the fact that the [r]espondent may have believed it could not grant any (increase in benefits) because the [u]nion won the representation election." Id. at 1396.[1]

The only material difference between *United Aircraft* and *McDonnell Douglas Aerospace Services*, on the one hand, and the instant case on the other is that in those cases the union was certified *before* the announced implementation date arrived, and in this case the election had been held but the Union had not yet been certified when the Respondent implemented its previously announced terms and conditions on September 1, 2012. Nonetheless, the Respondent would have risked an 8(a)(5) violation had it failed to implement the announced employment terms. As the cases discussed above demonstrate, the employment terms Respondent announced in 2011, to take effect September 1, 2012, were an *existing* condition of employment by virtue of that announcement. By *not* implementing the previously announced terms, the Respondent would have *changed* its employees' terms and conditions of employment. The Board has long held that an employer "acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending" because if the union is ultimately certified, the employer will have violated Section 8(a)(5) by making those changes. *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). Thus, here, following the Union's election, the Respondent would have acted at its peril had it refrained from implementing its previously announced employment terms. And when the Union was certified on May 13, 2013, that peril would have come to fruition as a violation of Section 8(a)(5).[2]

Finally, existing legal principles make clear that it was impermissible for the Respondent, having previously announced new employment terms, to insist, in negotiations with the Union, that the changes would not be implemented. To do so would have violated Section 8(a)(5) for the reasons just stated: Respondent's duty was to implement the changes on the previously announced implementation date, not to bargain over them. Moreover, by bargaining the Respondent would have additionally risked violating Section 8(a)(2) of the Act because the Union had not yet been certified as bargaining representative. Indeed, only one ballot had been counted at the time the Respondent implemented the changes at issue here, and that ballot was cast against representation.

[1] See also *Baker Brush Co.*, 233 NLRB 561, 562 (1977) (finding a promised wage increase "was, by reason of that promise, an existing condition of employment which [r]espondent—had the [u]nion been certified—would have been legally obligated to continue and could not alter without consulting the [u]nion").

[2] It is unclear from the stipulated record whether the previously announced changes improved employees' terms and conditions of employment, but that is irrelevant. See *NLRB v. Katz*, 369 U.S. 736, 744–746 (1962) (finding that arguably harmful unilateral change to sick leave and unilateral wage increase alike violated Sec. 8(a)(5)).

My colleagues hold that, under the particular circumstances of this case, Respondent would not have violated the Act by refraining from implementing the previously announced employment terms. However, my colleagues' statement to this effect has no plausible support in existing law. Indeed, their contention is contrary to the well-settled principles set forth in the text. My colleagues simply hold that preexisting legal principles are inapplicable here on the basis that the Respondent was party to an 8(f) agreement when it announced the changes. This is a distinction without a difference. The announced changes were not to take effect until that agreement expired. As stated above, the law permits an employer to implement new employment terms upon the expiration of an 8(f) agreement. *Deklewa*, supra. The only conceivable barrier to their implementation was the intervening election of the Union as the employees' 9(a) representative. However, the same event—intervening elections won by the union—happened in *United Aircraft* and *McDonnell Douglas Aerospace*, and the employers in those cases violated Sec. 8(a)(5) by *failing* to implement previously announced changes. I see no reasonable basis for concluding that the Respondent would not have similarly violated Sec. 8(a)(5) had it refrained from implementing the previously announced employment terms on September 1, 2012, merely because an 8(f) agreement was in effect at the time of that announcement.

My colleagues contend that employees working under an 8(f) agreement "would understand" that they could preserve their existing terms and conditions of employment by selecting the Union as their bargaining representative under Sec. 9(a). But this begs the question of what the employees' existing terms and conditions of employment *were* on the date of the election. As *United Aircraft* and *McDonnell Douglas Aerospace* make clear, employees' existing terms and conditions of employment *included* the previously announced terms and conditions of employment, to become effective on the expiration of the 8(f) agreement. Thus, *United Aircraft* and *McDonnell Douglas Aerospace* firmly support a conclusion that when it implemented those previously announced employment terms, the Respondent *did* preserve employees' existing terms and conditions of employment, as they were required to do under long-established law.

Moreover, even if it were known on September 1, 2012, that a majority of ballots had been cast for the Union, the Respondent had filed objections to the election, and those objections remained pending on September 1. Had those objections subsequently been found to require a rerun election, any bargaining would have been unlawful.

Citing *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 726, 726 fn. 52 (2001), my colleagues contend that the Respondent would not have risked an 8(a)(2) violation had it bargained with the Union over the terms and conditions the Respondent announced it would implement when the 8(f) agreement expired. But the situation here is unlike that contemplated in *Levitz*. In *Levitz*, the Board held that an employer does not risk violating Section 8(a)(2) by bargaining with an *incumbent* union whose representative status depends on majority support—i.e., an incumbent union *other than* an 8(f) representative—after the employer files an RM petition for an election to determine whether the incumbent union continues to enjoy majority support and while the employer's election petition remains pending. Here, had the Respondent bargained with the Union over the previously announced changes, it would have been bargaining with a union that had *never* demonstrated majority status. Outside the 8(f) context, which expressly contemplates bargaining with a union *regardless* of majority status—indeed, before employees have even been hired—the Board has never authorized an employer to bargain with a union whose majority status has *never* been established; and *Levitz* does not hold to the contrary.[3]

Because of this triple threat of violations for implementing the previously announced terms, refraining from implementing the announced terms, and bargaining concerning the announced terms, I cannot join the majority here. Instead, I would apply the following well-established principles, none of which breaks new ground: (i) an employer has the right to implement new terms and conditions of employment upon the expiration of an 8(f) agreement, *Deklewa*, 282 NLRB at 1385; (ii) terms and conditions decided upon and announced before a representation election may be lawfully implemented after the election, *Starcraft Aerospace*, 346 NLRB at 1230; (iii) where a union is certified in the interim between the date employment terms are announced and the date they are to be implemented, an employer violates Section 8(a)(5) if it fails to implement them, *McDonnell Douglas Aerospace*, 326 NLRB at 1396; and (iv) where an election takes place between the date employment terms are announced and the date they are to be implemented, but the union has not yet been certified by the implementation date, the employer acts at its peril if it fails to implement, *Mike O'Connor Chevrolet*, 209 NLRB at 703. Accordingly, the Respondent did not violate Section 8(a)(5) when it implemented previously announced terms and conditions of employment on September 1, 2012, the day after the 8(f) agreement expired.

2. The unilateral layoffs

I also disagree that the Respondent violated Section 8(a)(5) when it laid off employees in early 2013 because it had no work for them to perform. In my view, this is a simple issue. As discussed above, an employer violates Section 8(a)(5) if it makes a unilateral change in a term or condition of employment of its union-represented employees. See *Katz*, 369 U.S. at 743.[4] Thus, in order to find a violation of Section 8(a)(5) under *Katz*, the Board must find that a term or condition of employment has *changed*. Whether a change has taken place turns on whether the alleged "change" resulted in terms and conditions that "vary significantly in kind or degree from what had been customary under past established practice." *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574, 1577 (1965). Here, the parties' joint stipulation demonstrates that no change took place. The joint stipulation states that during the term of the 8(f)

[3] Because the situation here differs from the *Levitz* scenario my colleagues discuss, I need not and do not reach or pass on whether *Levitz* was correctly decided, either in this regard—i.e., whether an employer would violate Sec. 8(a)(2) if, during the pendency of an RM petition, the employer bargained with a union that has actually lost majority support—or otherwise.

The Board permits majority status to be established by means of contract language that satisfies certain formal requirements, without an actual *demonstration* of majority status. See *Central Illinois Construction (Staunton Fuel)*, 335 NLRB 717 (2001). For the reasons I expressed in my partial dissent in *King's Fire Protection, Inc.*, 362 NLRB No. 129 (2015), I believe the Board's decision in *Central Illinois* is precluded by the Supreme Court's decision in *Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961), and it was rejected by the Court of Appeals for the District of Columbia Circuit in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). See 362 NLRB No. 129, slip op. at 5–6 (Member Miscimarra, dissenting in part). However, notwithstanding my disagreement with the *manner* in which the Board, under *Central Illinois*, permits majority status to be established, that decision still requires that the union's majority status *be established*; and the Board has never held that an employer may lawfully bargain with a union whose majority status has *never* been established, whether by Board-conducted election, evidence of majority support in the form of signed petitions or signed union authorization cards, or the recitation of certain language in an 8(f) collective-bargaining agreement. Thus, my colleagues' contention that the Respondent could have lawfully bargained with the Union *before* its majority status had been established is unprecedented.

[4] In *Katz*, the Supreme Court held that "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of section 8(a)(5) much as does a flat refusal [to bargain]." Id.

agreement, the Respondent "laid off employees and did not provide notice to the Union before doing so." In February and March 2013, the Respondent laid off employees and did not provide notice to the Union before doing so. In other words, the Respondent did not change its established past practice of conducting layoffs unilaterally, i.e., without prior notice to the Union. Absent any change, I would not find that the Respondent violated Section 8(a)(5) under *Katz* when it conducted the layoffs.[5] Accordingly, I would dismiss this allegation.

In sum, I would find that the Respondent did not violate Section 8(a)(5) either when it implemented previously announced terms and conditions of employment or when it maintained the status quo regarding layoffs in the absence of available work. As to these issues, and for the reasons set forth above, I respectfully dissent.

Dated, Washington, D.C. October 27, 2016

Philip A. Miscimarra Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT lay off our unit employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

[5] The past practice was developed under a management-rights clause in the 8(f) agreement, which had expired. I recognize that under the Board's recent decision in *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016), this may mean the past practice was erased when the 8(f) agreement expired. However, for the reasons set forth in my dissenting opinion in *DuPont*, I believe the Board majority's decision in *DuPont* contradicts the Supreme Court's decision in *Katz*, supra, and will produce significant labor relations instability. See *DuPont*, supra, slip op. at 15–28 (Member Miscimarra, dissenting). Accordingly, I would adhere to precedent recognizing that a past practice is a past practice regardless of whether or not the practice developed under the auspices of a management-rights clause. See, e.g., *Beverly Health & Rehabilitation Services.*, 346 NLRB 1319, 1319 fn. 5 (2006); *Capitol Ford*, 343 NLRB 1058, 1058 fn. 3 (2004); *Courier-Journal*, 342 NLRB 1093, 1094–1095 (2004); *Courier-Journal*, 342 NLRB 1148, 1149–1150 (2004); *Winn-Dixie Stores, Inc.*, 224 NLRB 1418, 1431–1432 (1976); *Shell Oil Co.*, 149 NLRB 283, 287 (1964); *Beverly Health & Rehabilitation Services v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002) ("[I]t is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract.").

As my colleagues observe, the Union had not been certified when the layoffs occurred. Had the layoffs constituted a change, I agree that under *Mike O'Connor Chevrolet*, supra, the Respondent would have made that change at its peril. But this illustrates the impracticality of the *Mike O'Connor* "peril" rule. Under that rule, an employer in the "no-man's-land" period after an election but before certification may find itself in a quandary. Business necessity short of exigent circumstances may demand that it act, but it cannot make necessary changes in terms and conditions of employment without risking an 8(a)(5) violation should the union thereafter be certified. Neither can it safely give the union notice and an opportunity to bargain over proposed changes, since that would risk an 8(a)(2) violation should the union *not* be certified. With regard to any matter subject to a mandatory bargaining duty—and that covers a great deal—the employer must simply freeze its business operations or risk violating the Act. The *Mike O'Connor* "peril" rule discourages postelection changes regarding matters that might involve mandatory bargaining subjects if the union is ultimately certified, but I believe the Board has not properly addressed the Hobson's choice created by this rule, which requires employers to elect whether to refrain from taking actions that may be necessitated by substantial business considerations (where the failure to act may have adverse consequences for employees and the business generally), to implement changes that may subsequently be deemed unlawful if the union is certified, or to give the union notice and the opportunity for bargaining that may subsequently be deemed unlawful if the union is *not* certified. I need not address this issue here—in my view, the disputed layoffs did not constitute a change, so the "peril" rule should not apply—but in an appropriate future case, I believe the Board should consider modifying this aspect of *Mike O'Connor* to provide parties with greater certainty and stability during the postelection period when it remains unclear whether or when the union will be certified by the Board.

WE WILL, if requested to do so by the Union, rescind the changes to your terms and conditions of employment that we implemented on September 1, 2012.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of our unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All tile, marble, and terrazzo installers and helpers employed by the Respondent out of its Columbus, Ohio facility, but excluding office clericals and all professional employees, guards, and supervisors as defined in the Act.

WE WILL furnish to the Union in a timely manner the information it requested on May 3 and 17, 2013, to the extent we have not already done so.

WE WILL reimburse any union benefit funds for missed contributions, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Joe Thompson, Justin Hipkins, Tom McAllister, Rick Wilson, Tim Clemmons, Lee Clemmons, Greg Salabritas, Horacio Guzman, and Jose Ramirez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Joe Thompson, Justin Hipkins, Tom McAllister, Rick Wilson, Tim Clemmons, Lee Clemmons, Greg Salabritas, Horacio Guzman, and Jose Ramirez whole for any loss of earnings and other benefits suffered as a result of their unlawful layoffs, less any net interim earnings, plus interest.

WE WILL make our unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful September 1, 2012 unilateral changes, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

THE ARDIT COMPANY

The Board's decision can be found at www.nlrb.gov/case/09–CA–089159 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.